United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1422

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

Docket No. 74-1422

THOMAS PALERMO,

Petitioner-Appellant

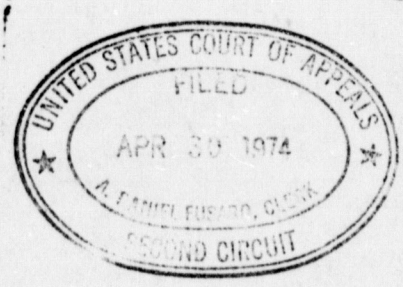
- v -

HON. LEON J. VINCENT,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT



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PRELIMINARY STATEMENT

This appeal, taken pursuant to Title 18, United States Code, Section 2253, is from the denial of a writ of habeas corpus and the dismissal of Appellant's petition for same in the District Court for the Eastern District of New York (Hon. John F. Dooling, Jr.)

Appellant is an inmate at the Green Haven Correctional Facility, Stormville, New York, having been incarcerated there following a jury trial in the Richmond County Supreme Court whereat he, and a co-defendant, were convicted of robbery in the first degree and of grand larceny in the second degree. On June 27, 1969, he was sentenced to a maximum term of twenty-five years for the robbery and to a concurrent term of 0 to 7 years for the grand larceny. His conviction was affirmed by the Appellate Division, Second Department, People -v- Palermo, 36 A.D.2d 1024 (1971), and by the New York Court of Appeals, People -v- Palermo, 32 N.Y.2d 222 (1973). A copy of this latter opinion is included in the Appendix to this brief (pp. A-80 to A-102*).

Appellant does not challenge the sufficiency of the evidence in the State Court proceedings. Rather he predicates his attack upon numerous prejudicial statements made by the prosecutor in his summation to the jury, and upon Appellant's having been unnecessarily gagged and excoriated by the trial judge in the presence of the jury.

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*Figures in parentheses preceded by the letter "A" refer to the pages of Appellants' Appendix.

*Figures in parentheses preceded by the letters "Tr." refer to pages of the trial transcript which are included in the record of this case.

Appellant contends that these defects in his trial served either individually or taken together to deprive him of a fair trial in accordance with the Due Process standards enunciated by the Fourteenth Amendment to the Constitution, wherefore the District Court erred in dismissing his petition and denying the writ of habeas corpus.

ISSUES PRESENTED

1. Whether the prosecutor's repeated references to Appellant as a "professional robber" so prejudiced the jury against Appellant as to deny him a fair trial.

2. Whether the prosecutor's repeated suggestions that certain defense witnesses were bribed by Appellant to perjure themselves on his behalf so prejudiced the jury against Appellant as to deny him a fair trial.

3. Whether the prosecutor's comments to the jury regarding his personal belief in the credibility of a defense witness, was so improper as to deny Appellant a fair trial.

4. Whether the cumulative effect of 1, 2 and 3 above served to prejudice the jury against Appellant so as to deny him a fair trial.

5. Whether the court ordered gagging of Appellant in the jury's presence was so prejudicial as to deny him a fair trial.

STATEMENT OF FACTS

Appellant was tried along with co-defendant Sheldon Saltzman for the 1968 robbery and grand larceny of Mrs. Eva Bonapane and her sister, Lea Ariosta, both of whom resided on Staten Island, New York.

At a trial characterized by the District Judge below as "in many ways . . . unsatisfactory" (A-83), Appellant raised the defense of alibi. A New Jersey policeman (Macaluso) testified that he had arrested Appellant for traffic infractions at Lodi, New Jersey at the same time that the alleged robbery took place on Staten Island. One Rackover, a diamond merchant also testified on Appellant's behalf that he was with Appellant in Lodi at the time in question.

In an effort to counter this testimony which, if believed, would have exonerated Appellant, the prosecutor urged the jury in his summation to infer that these defense witnesses either were accomplices of Appellant or had been "paid off" by Appellant to testify on his behalf. These remarks are set forth with specificity later in the body of this brief.

Additionally, the prosecutor repeatedly referred to Appellant as a "professional robber" although the record is barren of any evidence of the commission, by Appellant, of prior crimes.

These remarks apparently so provoked Appellant that during the course of the prosecutor's summation he (Appellant) interrupted with an inexcusable outburst directed against the prosecutor and the Court. The trial Judge, in Appellant's view, should have excused the jury at this juncture to deal with him in their absence. The Judge, however, proceeded to order the Court officers to gag Appellant in the full view and hearing of the jury. In Appellant's view, this was error which, when taken with the remarks made by the prosecutor, served to deprive him of his right to a fair trial in accordance with recognized standards of due process.

ARGUMENT

I. THE PROSECUTORS SUMMATION TO THE JURY WAS SO UNDULY PREJUDICIAL AS TO HAVE DEPRIVED APPELLANT OF A FAIR TRIAL.

> "Essentially, the prosecutor is to argue his case. He may discuss the evidence, the warrantable inferences, the witnesses and their credibility. He may talk about the duties of the jury, the importance of the case, and anything else that is relevant. He is not to interject his personal beliefs. The prosecutor is neither a witness, a mentor, nor a thirteenth juror. . . He must not appeal to the passion or prejudice of the jury directly, or by the introduction of irrelevant matter indirectly." United States -v- Cotter, 425 F.2d 450, 452 (1st Cir.1970).

It is submitted for the reasons hereinafter set forth, that the prosecutor's summation to the jury in the trial of the instant case fell far short of the standards enunciated in Cotter, supra.

A. The Prosecutors repeated references to Appellant as a "professional robber" were unduly prejudicial and violative of due process.

In his summation to the jury, the prosecutor repeatedly characterized Appellant as a "professional" criminal:

> "This was not a crime committed by novices. This was a crime committed by professionals in a highly professional manner." (A-21).

* * * * * *

"These were real professionals." (A-23).

* * * * * *

". . . this particular robbery was committed by professionals." (A-38).

* * * * * *

". . . and consistent with the type of a situation which you might consider contrived by professional robbers." (A-39)

* * * * * *

"And the reasoning on the part of a professional would be to work this thing out in such a way that isn't too incredible." (A-40).

The record indicates that no evidence whatsoever was adduced at trial as to any professionalism or prior criminal acts on the part of the Appellant. Indeed, it is submitted that the introduction of such evidence would have been improper at this trial, where the Appellant did not take the witness stand and where the defense was essentially one of 'alibi' - not of lack of motive or intent. See, United States -v- DeCicco, 435 F.2d 478 (2d Cir.1970); United States -v- Smith, 283 F.2d 760, 763 (2d Cir.1960). Moreover, it cannot fairly be argued that these remarks applied to Appellant's co-defendant Saltzman who testified in his own behalf that he (Saltzman) had never been convicted of a crime (Tr. 1056).

Notwithstanding the lack of an evidentiary foundation, the prosecutor improperly suggested the commission of prior similar crimes by Appellant. Such unwarranted accusations were held to have been error in People -v- Webb, 260 N.Y.S. 2d 95 (1965), where the prosecutor referred to the defendant as a "bum", and in People -v- Meckler, 244 N.Y.S. 2d 65 (1963), where the prosecutor characterized the defendant as a "gambler". See also People -v- Williams, 333 N.Y.S. 2d 507 (1972), where the prosecutor improperly accused the defendant of having previously committed similar crimes. See also United States -v- Gonzales, ___F.2d___, slip.op. p. 625,630 (2d Cir. 12/6/73), wherein this Court reversed, inter alia, because of the prosecutor's unprovoked reference, in summation, to the defendant as a "repeated junk dealer".

In the District Court, the Appellee-Respondent suggested that in the context of the trial record in the instant case "the prosecutor's remarks about professionalism refer to the skill of the robbery and the alibi rather than any prior record of the petitioner". (p. 7 Resp.'s Memorandum of Law). Appellant, in contending that this argument is specious, would call upon the Appellee to demonstrate of what relevance or materiality was the professionalism or amateurism of Appellant to the question of his guilt or innocence.

In our view, these improper statements were made with a view towards subtly advising the jury that Appellant was a previously convicted felon. As such, these remarks served to unduly prejudice the jury and to deny Appellant a fair trial in accord with the standards of the Fourteenth Amendment.

B. The Prosecutors suggestions that certain defense witnesses were accomplices of the Appellant or had been 'paid-off' by Appellant were unwarranted and improper and served to further deprive Appellant of a fair trial.

At his trial Appellant relied upon the defense of 'alibi'. Through a New Jersey State Motor Vehicle Officer (Macaluso), and through a jeweler named Rackover, Appellant endeavored to show that he had been far and away from the scene of the alleged crime at the time in question.

In an effort to negate the alibi testimony, the prosecutor exceeded the bounds of proper comment by suggesting that Macaluso and Rackover were accomplices of Appellant or that they had been bribed by Appellant to render false exculpatory testimony on his behalf.

For example, in referring to the testimony of Officer Macaluso, the prosecutor stated, "You noted that after his testimony was completed, he (Macaluso) sat in the courtroom as an interested spectator, and it appeared to me that his interest in this trial went far beyond that of a simple alibi witness." (Emphasis added) (A-40). Defense counsel's timely objection to this statement was overruled by the trial Judge. Appellant contends that this was error in that not only was the prosecutor injecting his personal beliefs into the case, but additionally, he was unfairly commenting upon matters which were not in evidence and which were totally

lacking in materiality.

Again, at A-44 - A-45, the Assistant District Attorney drew unreasonable inferences from the evidence (or from no-evidence) when he commented upon the testimony of defense witness Jerome Rackover, as follows:

> "Something else I would like to bring out. It is alleged here that Palermo committed a robbery. That would brand him as a robber, if proven beyond a reasonable doubt. Now, isn't it a strange thing that there should be a relationship between a man alleged to have committed a robbery involving the theft of jewelry, and this fellow Rackover, who was involved in the very same business? You will remember --
>
> MR. EVSEROFF: Objection
>
> THE COURT: Objection is overruled.
>
> MR. DI IORIO (Prosecutor): (continued) - You will remember that Rackover testified that he has a little stand or a showcase on the ground floor of the jewelry exchange on the Bowery in New York City... Now what more perfect companion can a robber have than a man involved in that kind of business, where jewelry is stolen--"

At this juncture, counsel for Appellant moved for the declaration of a mistrial "on the ground that the statements made by the District Attorney are so highly prejudicial and not based on any evidence in the case, as to preclude my client of the possibility of receiving a fair trial." (A-45) The motion was denied by the trial Court.

Appellant contends that the prejudice created by the prosecutor's unwarranted statements to the jury was not erased by the mildly curative instruction given to the jury by the trial Judge (A-45 - A-46), and that the motion for a mistrial should have been granted.

In commenting additionally upon Officer Macaluso's motives for testifying as a defense witness, the prosecutor improperly suggested that the witness had been "approached" prior to the trial (A-47). As before, Appellant's motion for a mistrial was denied, and his objection overruled. Tr. 1217-1218.

The Assistant District Attorney then elaborated upon his suggestion by stating:

> "Now when we evaluate the actions of Macaluso, and the strange circumstances surrounding the issuance of these two traffic summonses, we must come to the conclusion that there is something rotten in the State of Denmark. Now what would be the purpose, what would be the motive behind these actions which are so highly suspect? Could it have been a payoff of some kind? Could he have been --" Tr. 1218.

Appellant's objection to this extremely prejudicial statement by the prosecution again was overruled as was his motion for a mistrial.

Such statements by the prosecutor were held to be error in United States -v- Pepe, 247 F.2d 838, 844 (2d Cir. 1957). There, the prosecutor had characterized the testimony of a

defense alibi witness as "bought, paid for, and delivered". As in the instant case, the record was devoid of any evidence to substantiate the "payoff" inference drawn by the prosecutor. In overturning Pepe's conviction, this Court speaking through Judge Lombard stated that:

> "The District Court should have sustained the objection which was promptly and properly made. Where it is clear that there is no evidence in the record to support a charge of this nature, it seems to us that the trial judge should sustain the objection and so inform the jury. While it may be said that the jury can give proper weight to such considerations, counsel should not go so far beyond what is in the case." 247 F.2d at 844.

Once again, with regard to Rackover, the prosecutor asked rhetorically, "What would be his motive in trying to sell you a bill of goods... Could it have been a profit motive? (A-52 - A-53). As before, counsel's timely objection to these remarks was overruled, and the trial Judge gave another insufficiently curative instruction. Indeed, in our view, nothing that the trial Judge could have said to the Jury would have erased the extreme prejudice engenered by the prosecutor's summation.

Continuing, the Assistant District Attorney argued to the jury as follows:

> "Now is it possible that Palermo was able to unload the loot from this job with a fellow like Rackover-- A perfect drop for the fruits of a crime of this type?" A-54.

The timely objection to this remark was overruled, and another insufficiently curative instruction was given to the jury. (A-54 - A-55).

Thus, we are faced with a situation wherein the prosecutor drew unreasonable inferences from non-evidentiary assumptions. These assumptions and their accompanying inferences harm the defendant's cause by improperly destroying the very core of the defense, the credibility of alibi witnesses who testified on Appellant's behalf. Appellant strongly contends that the prosecutor should not have been permitted to make these arguments to the jury, and that once made, they should have been corrected by a strong statement from the trial Judge to the jury. To the contrary, however, the trial Court advised the jury that the prosecutor had every right to make the aforesaid arguments:

> "THE COURT: He(the Prosecutor) is talking now about possible motives of witnesses. He is arguing, Mr. Evseroff (Appellant's counsel), he is reasoning, and he has a right to do that. It is for the Jury, as I have already told the jury. If they accept his reasoning, they may accept it and consider it. If they do not accept it, they may reject it. That is basic.
>
> MR. EVSEROFF: Your Honor, must he not make inferences based upon the evidence in the case?
>
> THE COURT: Please continue, yes.
>
> MR. EVSEROFF: Is that not the law?
>
> THE COURT: Yes. I have overruled your objection, Mr. Evseroff.

We submit that the trial Court erred in allowing the prosecutor to so argue to the jury. Appellant contends that the jury had neither the right to "consider" the aforementioned reasoning of the prosecutor nor the right to "accept" it.

These errors were not inconsequential, and in our view, served to deprive Appellant of a fair trial in accordance with the Due Process Clause of the Fourteenth Amendment.

C. The Prosecutor improperly injected his personal views of the evidence, into the case.

During the course of his discussion of Officer Macaluso's credibility, the Assistant District Attorney expressed his personal view of the witness's credibility and motivation. In so doing, he exceeded the proper limitations of summation, thereby committing reversible error. It was not fair comment for the prosecutor to have characterized a witness's credibility by stating, "It appeared to me that his interest in the trial went far beyond that of a simple alibi witness." A-40.

It is fundamental that the prosecutor should not inject himself into a case, thereby throwing "his own weight into the scales against the defendant". United States -v- Pepe, supra, 247 F.2d at 844. See United States -v- Drummond, ___F.2d____, 1973 slip op. 4697 (2d Cir.), where the prosecutor similarly injected his credibility into the case. See also

People -v- Figueroa, 328 N.Y.S. 2d 514 (1971), where the prosecutor personally vouched for the integrity of several of the State's witnesses, and where same was held to be error. In Pepe, supra, this Court states sharply that, "We deplore the practice of a government prosecutor so injecting himself into the trial of a case unless doing so is unavoidable." 247 F.2d at 844. In the instant case, the error was hardly "unavoidable".

D. The cumulative effect of the foregoing infirmities in the Prosecutor's summation require the granting of the Writ.

While it may be argued that, taken individually, any of the aforementioned improprieties in the prosecutor's summation would not constitute reversible error, we submit that the cumulation of these defects clearly served to deprive Appellant of a fair trial in the Court below. The effect of these errors cannot, in our view, fairly be said to have been "harmless beyond a reasonable doubt" Cf. Chapman -v- California, 386 U.S. 18 (1967).

Finally, we wish to direct the Court's attention to the recent Second Circuit decision in United States -v- Drummond, supra, where a summation that was remarkably similar to that in the instant case, was held, inter alia, to be cause for reversal. There, the Court stated that:

"We need not decide whether any single one of the acts of prosecutorial misconduct would require us to reverse the conviction and remand this case to the busy Eastern District for a third trial. But the combination of them leaves us no other course. Reversed." 1973 Slip Op. at 4702.

II. THE COURT ORDERED GAGGING OF APPELLANT IN THE JURY'S PRESENCE WAS UNNECESSARY AND WAS SO PREJUDICIAL AS TO BE VIOLATIVE OF DUE PROCESS.

During the prosecutor's summation, Appellant interrupted the proceedings with a brief but concededly inexcusable outburst directed at both the Court and the Assistant District Attorney (A-49 - A-50). In response, Judge Kern, in front of the Jury, had Appellant gagged (A-50).

Notwithstanding certain dictum in the leading case of Illinois -v- Allen, 397 U.S. 337 (1970), we contend that gagging was the greater of the several 'evils' available to the trial Judge in the instant case. In Allen, supra, the actual holding of the Court was that a disruptive defendant, under certain circumstances, may be removed from the courtroom wherein his trial is proceeding, without violating the Confrontation Clause of the Sixth Amendment. In that case, the violent conduct of the defendant Allen, accompanied by his repeated threats to obstruct or altogether prevent the orderly proceeding of the trial against him, led the trial Judge to direct his removal from the trial. In holding that this was not contrary to the Confrontation Clause in that it was a waiver of the

right by the defendant, a majority of the Supreme Court suggested, "We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." 397 U.S. at 344.

Almost in the same breath, however, the Court pointed out that it would be loathe to recommend the use of the gagging technique:

> "Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort. Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold. 397 U.S. at 344. (Emphasis supplied)

In his concurring opinion, Justice Brennan noted that the aforementioned "three methods are not equally acceptable. In particular, shackling and gagging is surely the least of them. It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." 397 U.S. at 351-352.

The American Bar Association's Advisory Committee on the Function of the Trial Judge, agreed with Justice Brennan in that its recently approved Draft of Standards Relating to The Function of the Trial Judge, Rule 6.8, reads, in pertinent part, as follows:

> "The Disruptive Defendant.
> A defendant may be removed from the courtroom during his trial when his conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. (Emphasis added).

In short, there is something inherently abhorrent about gagging a defendant, particularly in the presence of a trial jury. This extreme measure should be taken only as a last resort in view of the extreme prejudice which is engendered therefrom. In the instant case, we submit that the trial Judge's proper course would have been to temporarily excuse the jury prior to the taking of either deterrent or punitive steps against the Appellant. Then, and only then, could the matter have been resolved in a manner which would not have deprived Appellant of a fair trial. At any rate, there simply was no need to have the jury witness the court officers stuffing a gag into the mouth or over the mouth of the man whose fate they were soon to decide.

CONCLUSION

For the reasons previously set forth herein, the District Judge below erred in dismissing the petition and denying the Writ of Habeas Corpus.

Respectfully submitted,

James O. Druker
Attorney for Appellant

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

JAMES O. DRUKER, being duly sworn, deposes and says, that he is the Attorney for the Appellant Thomas Palermo, with offices situated at 600 Madison Avenue in New York City.

On the 29th day of April, 1974, your deponent served a copy of the within Brief and Appendix upon the Hon. Louis Lefkowitz, Attorney General for the State of New York, and Attorney for the Appellee Hon. Leon Vincent, by depositing a true and correct copy thereof properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the United States Postal Service at 600 Madison Avenue, New York, New York, directed to Barbara Ann Shore, c/o Office of the Attorney General of the State of New York, Two World Trade Center, New York, New York 10047.

James O. Druker

SWORN TO BEFORE ME this

30th day of April, 1974

Kathleen M. Fowler

KATHLEEN M. FOWLER
NOTARY PUBLIC, State of New York
No. 30-6368070
Qualified in Nassau County
Commission Expires March 30, 1976